Supreme Court, U.S.
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NO. 941479

In the Supreme Court of the United States

OCTOBER TERM, 1994

ATLANTIC RICHFIELD COMPANY,
PETITIONER

V.

BRUCE BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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26pp

QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract, " applies to a claim asserted by the federal government for royalties under a mineral lease.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties appearing in the caption of the case, the following were parties to the proceeding below:

Phillips Petroleum Company
United States Department of the Interior
United States Minerals Management Service
Gary Johnson, successor to Nick L. Kelly, in his capacity as Area Manager, Dallas Area Compliance Office, Minerals Management Service, United States Department of the Interior,
Cynthia Quarterman, successor to Barry Williamson, in her capacity as Acting Director, Minerals Management Service, United States Department of the Interior
Manuel L. Lujan, Jr., former Secretary of the United States Department of the Interior

The individual defendants were named only in their official capacities.

Atlantic Richfield Company has no parent company, and it has only the following non-wholly owned subsidiaries:

85819 Canada Limited
AAPSS93, Inc.
AAPSS94, Inc.
Agro Internacional, S. de R. L. de C.V.
Alyeska Pipeline Service Company
AM/PM Japan Co. Ltd.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT (continued)

Arco Chemical Company
ARCO Solar Nigeria Ltd.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Cook Inlet Pipe Line Company
Dalrymple Bay Coal Terminal Pty., Ltd
Dixie Pipeline Company
East Heidelberg Salt Water Disposal Co.
East Texas Salt Water Disposal Co.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Capital Corp.
Kuparuk Transportation Company
Logan Aluminum Inc.
Lyondell Petrochemical Company
Olympic Pipe Line Company
Platts Pipe Line Company
Prince William Sound Oil Spill Response Corporation
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Vastar Resources, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Atlantic Richfield Company ("ARCO") respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., 1a-11a) is reported at 22 F.3d 616. That court's supplemental opinion on rehearing concerning the statute of limitations issue (Pet. App., 124a-127a) is unreported, as are the opinion, orders, and judgment of the district court (Pet. App., 12a-70a). The opinion of the Interior Board of Land

Appeals (Pet. App., 98a-121a) is reported at 110 IBLA 232. The remaining agency orders at issue (Pet. App., 71a-97a) are unreported.

JURISDICTION

The court of appeals entered its initial judgment (Pet. App., 1a-11a) on June 10, 1994. The court thereafter granted rehearing and entered a modified judgment (Pet. App., 124a-127a) on September 7, 1994. A further petition for rehearing was denied on November 1, 1994 (Pet. App., 122a-123a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

ARCO relies upon Rule 12.3 in filing this cross-petition for a writ of certiorari. ARCO received the government's Petition for a Writ of Certiorari on February 6, 1995.

STATUTORY PROVISION INVOLVED

28 U.S.C.§ 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .

STATEMENT

ARCO filed this suit to challenge four distinct but related Interior Department actions: a final decision issued by the Interior Board of Land Appeals ("IBLA") in August, 1989, and three Minerals Management Service ("MMS") orders issued in September, 1989. Through these administrative actions, Interior is demanding that ARCO recalculate and pay additional royalties dating back to 1980, using unpublished royalty-valuation criteria that Interior first developed internally in late 1984. The district court consolidated ARCO's case with three similar cases filed against Interior by Phillips Petroleum Company ("Phillips"). Jurisdiction in the district court was premised on 28 U.S.C. § 1331(a) and 43 U.S.C. § 1349(b).

The district court rendered a final judgment on cross-motions for summary judgment, and Phillips and ARCO both appealed to the Fifth Circuit Court of Appeals. In its original decision (Pet. App., 1a-11a), the Fifth Circuit held Interior could not lawfully apply new royalty-valuation criteria without first complying with the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b). This decision was dispositive of ARCO's case. It was not, however, dispositive of two of Phillips' cases. Therefore, in a supplemental opinion on rehearing (Pet. App., 124a-127a), the Fifth Circuit additionally ruled on an alternative issue that both Phillips and ARCO had raised below — the question of whether the six-year statute of limitations of 28 U.S.C. § 2415(a) applies to bar untimely royalty claims asserted by Interior under federal mineral leases.

The Fifth Circuit held that the statute of limitations does not apply to Interior's royalty claims. Phillips filed a petition for a writ of certiorari with respect to this issue, which has been docketed in this Court under No. 94-1287. ARCO, having won its case on other grounds, was not aggrieved by the statute of limitations decision. It, therefore, did not file its own petition. As a member of the American Petroleum Institute, however, it will be filing an amicus curiae brief in support of Phillips' petition.

Interior likewise filed a petition for a writ of certiorari to seek review of the Fifth Circuit's decision on the APA issue. If the Court should grant the government's writ petition, and if it should reverse the Fifth Circuit's holding that Interior's actions against ARCO violated the APA, then ARCO would be aggrieved by the Fifth Circuit's ruling that Interior's royalty claims are not subject to the six-year statute of limitations of 28 U.S.C. § 2415(a). Accordingly, ARCO is cross-petitioning for a writ of certiorari with respect to this important issue.

28 U.S.C. § 2415(a) imposes a general six-year limitation on contract actions brought by the United States. A mineral lease undoubtedly is a contract, and the obligation to pay royalties clearly is a covenant under that contract. Nevertheless, the Fifth Circuit held that section 2415(a) does not apply to actions by Interior to collect royalties under its federal mineral leases.

According to the Fifth Circuit, Interior can issue administrative orders requiring lessees to pay additional royalties, impose penalties for a lessee's noncompliance with those orders, adjudicate the lessee's administrative

appeals of the orders, and even counterclaim in court for judicial enforcement of its orders if the lessee seeks judicial review, all without ever engaging in "an action for money damages" that would be barred by the six-year statute of limitations of section 2415(a).

Under this decision, there is no time limit whatsoever on Interior's ability to demand and enforce payment of additional royalties claimed to be due under federal mineral leases. The question presented is thus of critical importance to United States energy producers. Without the protection of a statute of limitations, their accounts are open forever, and they are forever vulnerable to government demands for payment of stale contractual obligations.

The Fifth Circuit's decision also is in direct conflict with decisions of the Tenth Circuit Court of Appeals, and it is in substantial conflict with decisions of the District of Columbia Circuit Court of Appeals. The Tenth Circuit previously has held that the running of the limitations period of section 2415(a) can be asserted as a defense to royalty demands by Interior in administrative proceedings or subsequent litigation. *See, e.g., Mesa Operating Ltd. Partnership v. Dep't of Interior,* 17 F.3d 1288, 1291 (10th Cir. 1994). In the Tenth Circuit, Interior's right to collect past royalties expires six years after the agency knew or reasonably should have known of the alleged underpayment. *See, e.g., Phillips Petroleum Co. v. Lujan,* 4 F.3d 858 (10th Cir. 1993). The District of Columbia Circuit similarly has rejected an argument that would have allowed the government to avoid a different but analogous statute of limitations by using administrative, instead of judicial pro-

cedures in the first instance. *3M Co. v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994).

REASONS FOR GRANTING THE PETITION

ARCO adopts and incorporates by reference the petition for writ of certiorari filed by Phillips in *Phillips Petroleum Co. v. Johnson,* No. 94-1287. As shown there, this Court previously has recognized that statutes of limitation are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio,* 446 U.S. 478, 487 (1980). This Court also previously has recognized that the statute of limitation provision at issue here, 28 U.S.C. § 2415(a), was enacted in order to "equalize[ ] the litigative opportunities between the government and private parties." *Crown Coat Front Co. v. United States,* 386 U.S. 503, 521 (1967). Because section 2415(a) concerns "Government litigation. . .that arises out of an activity which is very similar to commercial activity," "fairness and equity" require "that the law should provide a period of time within which the Government must bring suit on claims," as it does for the claims of private individuals. S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

The Fifth Circuit's reading of section 2415 deprives federal mineral lessees, and possibly all government contractors, of the fairness and equity afforded private individuals. As a result of this decision, mineral lessees in the Fifth Circuit, the circuit where most federal oil and gas resources lie, will be forever subject to claims of Interior's auditors and bureaucrats without any time limitation whatsoever. To give the Interior *carte blanche* to collect

additional royalties years after the fact injects unnecessary uncertainty into an already volatile industry and is counterproductive for this nation's energy policy.

In addition, the Fifth Circuit's decision is in direct conflict with decisions of the Tenth Circuit, which adheres to the contrary view that section 2415(a) does in fact apply to Interior's royalty collection efforts. The decision also conflicts with the limitations decisions of other circuits, which have enforced Congress's intent to level the playing field between the government and private litigants.

A. The Fifth Circuit's Decision Conflicts With Decisions Of Other Circuits That Have Considered Section 2415(a).

The Fifth Circuit's decision creates a conflict between the two most important circuits for the administration of federal mineral leases. At present, the United States is subject to the statute of limitations provided in section 2415(a) when it attempts to collect past royalties in the Tenth Circuit, but not when it attempts to do the same thing in the Fifth Circuit. The Tenth Circuit has taken the view that, because "oil and gas leases are contracts," section 2415(a) is "the controlling statute of limitations" applicable to Interior's efforts to collect unpaid royalties. *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 860 and n.1. (10th Cir. 1993).

The Tenth Circuit recently reaffirmed that "the statute of limitations commences to run in an action by the government to recover unpaid royalties from oil and gas leases when the government knew or should have known

about the deficiency." *Mesa Operating Ltd. Partnership v. Dep't of Interior,* 17 F.3d 1288, 1291 (10th Cir. 1994). Although the lessee in *Mesa* waived the defense, "the statute of limitations would have been a defense to payment" had it not been waived. *Id.*

The decision of the Fifth Circuit also conflicts with the decisions of other circuits interpreting federal statutes of limitation. The Fifth Circuit concluded that an action to enforce an administrative order to comply with a contractual royalty obligation by paying money is not "an action for money damages" within the meaning of section 2415(a). The Fifth Circuit based this conclusion on two grounds: (1) the government had not filed a "complaint," even when it filed a counterclaim seeking judicial enforcement of its orders to pay the additional royalties claimed to be due; and (2) the royalties that Interior sought to collect were not "compensatory" and thus were not "damages."

These conclusions conflict with the decisions of other courts of appeals, which have given a broader reading to the term "action for money damages" in section 2415(a). For example, in *United States v. Toro,* 981 F.2d 1045, 1047 (9th Cir. 1992), the court held that the government's motion to forfeit a bail bond was subject to the six-year limitation of section 2415(a), even though the government's claim was asserted by a motion filed within a pre-existing criminal action rather than in an independent lawsuit. Similarly, in *FDIC v. Bachman,* 894 F.2d 1233, 1237 (10th Cir. 1990), the government's claims "to enforce notes, guaranties, or other contracts" to pay money were held to be limited by section 2415(a). Section 2415(a) also has been applied to bar an action to recover a deficiency on a prom-

issory note, even though related equitable action to foreclose a mortgage was not barred. *United States v. Alvarado*, 5 F.3d 1425, 1428, 1430 (11th Cir. 1993); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489-1490 (9th Cir. 1993). In these cases, the courts concluded that an action to collect a debt that is founded on a contract is not outside the scope of section 2415(a) simply because the action alternatively could be characterized as a request for a specific performance of a contractual obligation to pay money.[1]

The Fifth Circuit's decision that "[a]gency orders are . . . not barred by the limitations of Section 2415" also conflicts with decisions in other circuits. In *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), for example, the court held that the five-year statute of limitations for any "action, suit or proceeding" to enforce a civil penalty applied even to "civil penalty cases brought before agencies." *Id.* at 1455-56. The court rejected the argument that only judicial actions, suits or proceedings could be barred as untimely: "[G]iven the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when the "action or proceeding is brought in a court, but not when it is brought in an administrative agency." *Id.* at 1457.

This Court should resolve these conflicts since the

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[1] *See also United States v. Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying section 2415(a) to an action to enforce loan guaranties); *United States v. Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.) (same), *cert. denied*, 493 U.S. 818 (1989); *United States v. Moore*, 968 F.2d 1099, 1101 (11th Cir. 1992) (an action to set aside a fraudulent conveyance is an action in quasi-contract and thus is covered by section 2415(a)).

conflicting opinions will make a lessee's liability for stale royalty obligations dependant upon the location of its suit, and the result will be unnecessary forum shopping.

B. Application Of The Statute of Limitations To Federal Royalty Collections Is A Question Of Exceptional And Recurring Importance.

Even if there were no conflict in the circuits, the question before the Court is of exceptional and recurring importance because it effectively removes all time limitations from government claims for the collection of mineral lease royalties and because it comes from the circuit where most leased oil and gas production takes place. The Fifth Circuit decision directly affects the holders of 24,000 producing and producible federal leases by depriving them of the "settled expectations" that stale royalty claims "will be barred." *Tomanio,* 446 U.S. at 487. That the issue is recurring is evidenced by the numerous cases in which it has been raised.[2]

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[2] *See, e.g., Atlantic Richfield Co. v. Lujan,* 811 F. Supp. 1520 (N.D. Okla, 1992; *Anadarko Petroleum Corp. v. Babbitt,* No. 3:92-CV-885-X (N.D. Tex. Sept. 23, 1993) (reviewing *Anadarko Petroleum Co.,* 122 IBLA 141 (1992)); *Enron Oil & Gas Co. v. Babbitt,* No. CV93-0980 (W.D. La.); *Amoco Production Co. v. Lujan,* Civil No. 92-3381 (E.D. La.); *Phillips Petroleum Co. v. Johnson,* No. 3:91-CV-1610-H (N.D. Tex.); *Phillips Petroleum Co. v. Kelly,* No. 3:89-CV-2670-H (N.D. Tex.); *Conoco, Inc. v. Lujan,* No. 3:89-CV-2551-G (N.D. Tex.); *ARCO Oil & Gas Co.,* 131 IBLA 299 (1994)' *Chevron U.S.A., Inc.,* 129 IBLA 151 (1994); *Texaco, Inc.,* 129 IBLA 46 (1994); *Marathon Oil Co.,* 128 IBLA 168 (1994); *BHP Petroleum (Americas) Inc.,* 124 IBLA 185 (1992); *Benson-Montin-Greer Drilling Corp.,* 123 IBLA 341 (1992); *Marathon Oil Co.,* 119 IBLA 345 (1991); *Mobil Exploration & Producing U.S., Inc.,* 119 IBLA 76 (1991); *Amoco Production Co.,* 114 IBLA 42 (1990); *Forest Oil Corp.,* 111 IBLA 284 (1989).

Moreover, the issue presented is a question of broad significance; that is, whether an agency, in the Interior Department or elsewhere, can avoid the limitations period of section 2415(a) simply by ordering the payment of disputed contract amounts administratively, waiting for judicial review to be sought and then counterclaiming to enforce the original order to pay. Under the Fifth Circuit's decision, no time limit applies at any stage of these proceedings. If exploited, this result could affect all persons doing business with the government.

C. The Fifth Circuit's Ruling That The United States May Collect Lease Royalties Without Any Time Limitation Is Erroneous.

The Fifth Circuit's decision gives the United States a limitless time to assert and enforce claims demanding the payment of royalties claimed to be due under federal mineral leases. This decision is erroneous. Section 2415(a) applies to every action "for money damages . . . which is founded upon any contract express or implied in law." The statute clearly encompasses an action to collect royalties alleged to be due under a mineral lease.

The Fifth Circuit erroneously concluded that an action to recover royalties is not an action for "money damages," relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, this Court held that a state's action to enforce its alleged statutory entitlement to reimbursement for Medicaid services was not an action for "money damages." As the Court recognized, a state's suit to enforce the statute "is not a suit seeking money in *compensa-*

tion for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." 487 U.S. at 900 (emphasis in original). In *Bowen*, this meant that the action for judicial review of an administrative decision was not relegated to the Claims Court, but came within the waiver of sovereign immunity in the APA. A wholly different issue is presented here. Moreover, the analysis used in *Bowen*, which involved enforcement of a statutory right, is distinguishable from this case, where the government seeks to recover damages for breach of a contract to pay royalties and where the issue is the applicability of a statute of limitations. *Bowen's* narrow reading of the term "money damages" should be confined to cases presenting circumstances similar to that case, and "should not be treated as a widely applicable, general rule for determination of the nature of the relief sought. " *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994).

Moreover, unlike the legislative history of the APA examined by this Court in *Bowen*, the structure and history of section 2415(a) indicates that Congress intended all contract actions to be actions for "money damages" within the six-year statute of limitations. The statute enumerates specific exceptions, such as contracts involving title to and possession of land. In all other circumstances, by enacting section 2415(a), Congress clearly desired to put private litigants on an equal footing with the government. *Crown Coat Front Co.*, 386 U.S. at 521 and n.14. A lessee who pays a disputed royalty and then sues for a refund is bound by a general limitations provision, 28 U.S.C. § 2401. It is difficult to understand why the govern-

ment, on the other hand, should have an unlimited time to pursue its remedies. Indeed, the legislative history of section 2415(a) dispels any doubt that an "action for money damages" under section 2415(a) includes an action to enforce the payment of a sum owed under a contract. *See*, S. Rep. No. 1328, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N., 2502; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

The Fifth Circuit also erroneously concluded that neither administrative orders requiring the payment of past-due royalties nor a counterclaim seeking enforcement of such an order is an "action for money damages" because neither is initiated by the filing of a "complaint." The court relied on the language of 28 U.S.C. § 2415(a), which states that "every action for money damages" shall be barred unless the "complaint" is filed within six years. This overly technical construction of the statute leads to irrational results and is belied by the statutory language, the statute's legislative history, and even Interior's own prior construction of the statute as applying to mineral lease royalty demands.

Certainly, a "complaint" must be timely filed to stop the running of the limitations period. If it is not, however, under the plain language of the statute, every action — including administrative actions — thereafter will be barred. This common-sense construction finds consistent support in other provisions of the statute as well. For example, section 2415(a) provides a one-year savings provision which states that a complaint will be timely, even if filed more than six years after the government's right of action accrues, if it is filed "within one year after final decisions

have been rendered in applicable administrative proceedings required by contract or by law." Congress clearly did not view administrative proceedings as being beyond the purview of the statute. Rather, administrative proceedings were viewed as a predicate to, not a substitute for, judicial proceedings.

The express exception for administrative-offset actions in section 2415(i) likewise shows that administrative proceedings were intended to be "actions" barred by section 2415(a) — unless expressly exempt. Had Congress meant to bar only judicial actions commenced by the filing of a complaint, section 2415(i), creating an exception for administrative-offset actions, would not have been necessary. Similarly, if only complaints were barred, section 2415(f), which allows the assertion of time-barred claims by way of counterclaim or offset in certain circumstances, would not have been necessary.

The statute's legislative history similarly shows that *all* stale claims were intended to be barred — not simply those asserted in stale complaints. S. Rep. No. 1328, 89th cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2502; H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966).

Finally, Interior itself has consistently interpreted the statute as applying to federal royalty claims. For example, in a May 10, 1974 Memorandum, Interior's Assistant Solicitor concluded that a claim for federal royalties is a claim for money damages under a contract. The memo was circulated to the agency's various regional managers with the admonition that "[i]n view of the six-year statute of limitations, each Area Office should place as much em-

phasis as possible" on auditing, reviewing lease account balances, "demanding payments, and taking the necessary follow-up action. . . ." Similarly, a September 22, 1976 Memorandum, also authored by Interior's Assistant Solicitor, concluded that "[the statute's] practical effect is to preclude the Survey from billing . . . for royalties which accrued more than six years prior to the date of the billing."

The statutory language of section 2415(a), its legislative history and Interior's own prior construction of the statute all compel the same conclusion — that the Fifth Circuit was incorrect in holding that mineral lease royalty demands are exempt from the statute. To keep the government's mineral lessees forever subject to the risk that the government could demand additional royalties for any past period of production would have an adverse impact on this country's energy industry.

The Court should particularly grant this petition if it also takes up the Interior Department's petition on the Administrative Procedure Act issue. If the Court were to grant Interior's writ petition and reverse the Fifth Circuit's decision on the APA issue, but not grant ARCO similar relief on the statute of limitations issue, ARCO would be severely prejudiced. ARCO would be subject to the requirement that additional royalties be paid simply because it did not have the clairvoyance to foresee the royalty-valuation criteria that Interior would subsequently develop and retroactively apply. Moreover, under the Fifth Circuit's ruling, ARCO could be required to retroactively recalculate its royalties using these new criteria for all of its federal offshore leases, for each and every month, dating

back to the inception of these leases.

CONCLUSION

For all of the foregoing reasons, ARCO's Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

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OCTOBER TERM, 1994

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ATLANTIC RICHFIELD COMPANY, CROSS-PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations period under 28 U.S.C. 2415(a) during which the United States may commence an "action for money damages" founded upon a contract governs either the issuance by the Department of the Interior's Minerals Management Service of an administrative order directing a lessee to pay royalties due under a federal oil and gas lease or the government's filing of a counterclaim (in a suit brought by the lessee challenging the order) for enforcement of such an administrative order.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1287

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, ET AL.

No. 94-1479

ATLANTIC RICHFIELD COMPANY, CROSS-PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The supplemental opinion of the court of appeals on the matter at issue here (Pet. App. 1a-4a)[1] is not

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[1] Unless otherwise noted, references are to the petition and accompanying appendix in No. 94-1287.

reported, but the decision is noted at 36 F.3d 89 (Table). That court's prior opinion (Pet. App. 5a-14a) is reported at 22 F.3d 616. The opinion, orders, and judgment of the district court (Pet. App. 15a-78a) are unreported, as are the orders of the Department of the Interior's Minerals Management Service (Pet. App. 79a-100a).

JURISDICTION

The court of appeals entered its initial judgment on June 10, 1994. The court thereafter granted rehearing and entered a new judgment addressing the question presented here (but otherwise abiding by the prior opinion) on September 7, 1994. A further petition for rehearing was denied on November 1, 1994. Pet. App. 101a-103a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The complicated procedural history of this case is discussed in some detail in our petition for a writ of certiorari in *Babbitt* v. *Phillips Petroleum Co.*, No. 94-1292 (filed Jan. 30, 1995). We repeat or add here only the background and details particularly relevant to the limitations issue raised by the present petition and cross-petition.

1. Congress has authorized the Department of the Interior to enter into and administer leases providing for the development of federal oil and gas resources, including those located off the coast of the United States. See, *e.g.*, 43 U.S.C. 1331 *et seq.* (the Outer Continental Shelf Lands Act (OCSLA)). Leases for development of offshore oil and gas are generally to be granted to "the highest responsible qualified bidder" after a public, competitive bidding process, and gen-

erally provide for payment of royalties calculated as a specified percentage of the "amount or value of the production saved, removed, or sold" by the lessee. 43 U.S.C. 1337(a)(1). The value of production is to be determined by the Director of the Minerals Management Service (MMS) in the Department of the Interior, and must "never be less than the fair market value." 30 C.F.R. 206.150 (1987).[2] As a practical matter, however, lessees track and report their own production, its value, and the royalties due thereon, subject to audit by MMS's Royalty Compliance Division. See generally, *e.g.*, 30 C.F.R. 217.50, 218.50; see also *Cities Service Oil & Gas Corp.*, 113 IBLA 255, 260 (1990).

In 1983, Congress concluded that the government's methods of determining and collecting oil and gas lease royalties were "archaic and inadequate." Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), Pub. L. No. 97-451, § 2(a)(2), 96 Stat. 2448 (1983), codified at 30 U.S.C. 1701(a)(2). Congress therefore acted "to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases," and "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States." 30 U.S.C. 1701(b)(2)-(3).[3]

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[2] The valuation regulation applicable to the periods of production at issue in this case was substantially expanded and redesignated as of March 1, 1988. See 30 C.F.R. 206.152-206.153; 53 Fed. Reg. 1230 (1988).

[3] Section 109 of FOGRMA establishes a graduated scale of penalties for persons who fail or refuse to comply with FOGRMA or related requirements. 30 U.S.C. 1719. Section

FOGRMA directs the Secretary to establish "a comprehensive inspection, collection and fiscal and production accounting and auditing system * * * to accurately determine oil and gas royalties * * * and to collect and account for such amounts in a timely manner." 30 U.S.C. 1711(a). In particular, the Act directs the Secretary to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and [to] take appropriate actions to make additional collections or refunds as warranted." 30 U.S.C. 1711(c)(1). Lessees, in turn, are required to maintain and provide whatever records, reports, and information the Secretary may reasonably require by rule for purposes of implementing the Act. 30 U.S.C. 1713(a). Relevant records must be maintained for six years "unless the Secretary notifies the record holder that he has initiated an audit or investigation involving such records," in which case they must be maintained "until the Secretary releases the record holder" from its retention obligation. 30 U.S.C. 1713(b).

The Secretary has delegated responsibility for administering lease arrangements and enforcing royalty requirements to the Director of the MMS. See generally 30 C.F.R. Pt. 218 (1987); 30 C.F.R. 218.150, 241.51 (1987). Lessees may appeal the orders or decisions of subordinate MMS officials to the Director. See 30 C.F.R. 290.1-290.5 (1987). The

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112(a) confers broad authority on the Attorney General, "[i]n addition to any other remedy under [FOGRMA] or any mineral leasing law," to bring civil actions in the federal courts "to restrain any violation of [FOGRMA]" or "to compel the taking of any action required by or under [FOGRMA] or any mineral leasing law of the United States." 30 U.S.C. 1722(a).

Director's decisions, in turn, are subject to review by the Interior Board of Land Appeals (IBLA), which renders final agency decisions on such issues on behalf of the Secretary. See 30 C.F.R. 290.7 (1987); 43 C.F.R. 4.1, 4.1(b)(3) (1987).

2. In 1986, the Regional Manager of MMS's Tulsa, Oklahoma compliance office ordered a lessee affiliate of cross-petitioner Atlantic Richfield Company (ARCO) to pay additional royalties on prior production of certain natural gas liquid products (NGLPs). ARCO appealed that order to the MMS Director, who affirmed it. See 94-1292 Pet. App. 100a-101a. ARCO then appealed to the IBLA, which modified MMS's NGLP valuation methodology and remanded for recomputation of the additional royalties due. *Conoco and ARCO Oil & Gas Co.*, 110 IBLA 232 (1989) (*reprinted at* 94-1292 Pet. App. 98a-121a); see also 94-1292 Pet. 8-10.

Shortly after the IBLA's decision on ARCO's appeal, MMS issued three additional NGLP royalty compliance orders to ARCO and one to petitioner Phillips Petroleum Company. Petitioners[4] both filed suit to block enforcement of the orders, arguing in part that some or all of the additional royalty claims were barred by the statute of limitations set out in 28 U.S.C. 2415(a) for government suits seeking money damages for breach of contract. ARCO later amended its complaint to add a challenge to the IBLA's decision. The two actions were consolidated with each other and with two additional suits by Phillips raising similar statute-of-limitations (and

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[4] For simplicity, we refer to petitioner Phillips and cross-petitioner ARCO collectively as "petitioners."

other) issues in the context of a different royalty dispute.[5]

After the Department had filed its initial answer, a different district court hearing a similar case brought by Phillips to enjoin enforcement of another royalty compliance order issued by the MMS held that the government was required to file a counterclaim in order to seek enforcement of the order. See *Phillips Petroleum Co.* v. *Lujan*, No. 89-C-914-B (N.D. Okla. May 5, 1992). Although the Department disagreed with that decision, it moved to protect its position in this litigation by requesting leave to amend its answer and to add counterclaims seeking a declaration of the validity of the MMS orders and a court order requiring Phillips and ARCO to comply with the MMS orders. See Gov't C.A. Br. 8-9 & n.5. Petitioners opposed the government's motion, arguing that because the counterclaims were "merely the mirror image of plaintiffs' complaints," they were "not complaints for money damages as required by 28 U.S.C. § 2415." See *id.* at 9. The district court granted the government's motion to file the counterclaims, to relate back to the date of the government's original answers. See *ibid.*

ARCO moved for summary judgment on the counterclaims, contending that the government's

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[5] The non-NGLP cases challenged MMS orders requiring payment of additional royalties on certain amounts received from purchasers as reimbursement for production-related costs. The substantive issue involved was resolved in favor of the government in other litigation, see *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992), leaving primarily the limitations challenge to be resolved in this proceeding.

counterclaims did not constitute "a complaint (or even a counterclaim) for money damages, as required by § 2415," and that "the enforceability of the orders must await the filing by the defendants of the proper procedural vehicle to collect the royalties that are claimed due—a complaint for money damages." See Gov't C.A. Br. 9. Phillips similarly argued that the counterclaims did not constitute complaints for money damages. See *id.* at 9-10.

On petitioners' initial claims challenging the MMS orders, the district court granted partial summary judgment for the Secretary, upholding the Department's NGLP valuation methodology and the orders' requirement that the companies recompute royalties due. Pet. App. 52a-77a. The court also granted partial judgment for petitioners, holding that Section 2415(a) "bars the Government from bringing any causes of action against Phillips and ARCO based on royalty payments * * * that are due and owing for more than six years." Pet. App. 52a; see *id.* at 37a-52a, 77a. In a later order (*id.* at 18a-20a) granting in part the government's motion for summary judgment on the counterclaims, however, the court clarified that its prior order had "ruled that the MMS's orders issued to Phillips and ARCO were valid and enforceable." *Id.* at 18a. Noting that its prior discussion of Section 2415(a) "applie[d] only to an 'action for money damages'" and "indicate[d] how the Court would treat a claim for money damages if one were to be filed," the court made clear that "no such action is currently pending" and that "section 2415 has no direct application to the MMS orders." Pet. App. 19a. The court therefore granted judgment on the counterclaims to the extent that the government sought to enforce the MMS orders in accordance with their

terms and those portions of the court's order granting summary judgment on the merits. *Id.* at 15a-17a.

3. The court of appeals initially reversed on the basis of an interpretation of the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), relevant to some but not all of the consolidated cases, without reaching the statute-of-limitations issue. Pet. App. 5a-14a. The panel's APA ruling is the subject of our petition for a writ of certiorari in No. 94-1292. Both parties sought rehearing on the limitations question, and the court issued a supplementary opinion resolving the issue in favor of the Secretary. Pet. App. 1a-4a.

The court rejected petitioners' argument that 28 U.S.C. 2415(a) bars the issuance or enforcement of administrative orders to pay past due royalties, holding that "actions for money damages" within the meaning of that Section "are commenced by filing a complaint" and involve "a suit in court seeking compensatory damages." Pet. App. 3a. In this case, the court held, the United States had filed no "complaint" for purposes of Section 2415(a). Pet. App. 3a & n.1. In addition, relying on this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988), the court held that the royalties sought by the MMS orders could not be considered "compensatory," and therefore did not fall within the proper construction of the term "money damages" as used in 28 U.S.C. 2415(a). Pet. App. 4a. Thus, collection of royalties through enforcement of the agency's orders was not barred by Section 2415(a). Pet. App. 4a.

ARGUMENT

1. Petitioners argue (*e.g.*, Pet. 25) that the general statute of limitations for "action[s] for money damages brought by the United States * * * founded upon any contract," 28 U.S.C. 2415(a), bars the Department of the Interior from issuing an administrative order for the payment of royalties on a federal offshore gas lease, or from seeking judicial enforcement of such an order, more than six years after petitioners' obligation to calculate and pay those royalties first arose.[6] That contention is incorrect for several reasons.

a. Section 2415(a) is a general background statute of limitations, which applies "except as otherwise provided by Congress." 28 U.S.C. 2415(a).[7] As described above, however (see pages 2-5, *supra*), the Outer Continental Shelf Lands Act (OCSLA), the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), and the regulations implementing them together create a comprehensive structure for the administration and development of federal offshore natural gas resources. That structure contains its own enforcement mechanisms, which do not depend on the filing of any "action for money damages" covered by Section 2415(a).

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[6] The cross-petition in No. 94-1479 merely "adopts and incorporates by reference" the petition in No. 94-1287 (94-1479 Pet. 6), without advancing any significant additional argument. Our response therefore does not differentiate between the two.

[7] Limitations provisions such as Section 2415(a) are, of course, to be strictly construed in favor of the government. *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)).

Lessees are initially responsible for computing and paying the royalties due under their leases. The Secretary retains, however, the ultimate authority to determine the value of the production on which royalties are based, and lessees remain responsible to make required royalty payments "in the time and manner * * * specified by the Secretary." 30 U.S.C. 1712(a)(1). That system requires, and the law provides, a structure for the audit of lessees' payments and the refund or collection of amounts overpaid or underpaid. See generally 30 U.S.C. 1701, 1711(a) and (c).

As petitioners explain (Pet. 5-6), once an audit identifies a possible underpayment, Minerals Management Service (MMS) officials consult with the lessee in an attempt to agree on the proper amount. If that attempt fails, the MMS issues an order directing the lessee to pay the additional amount it determines to be due. That order is appealable within the Department of the Interior, and the Department's final decision, rendered by the Interior Board of Land Appeals (IBLA), is subject to review by the courts.[8]

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[8] The Department's regulations require a lessee to exhaust its administrative remedies before challenging a royalty payment order in court. 30 C.F.R. 243.3; see also 43 C.F.R. 4.21(c) (addressing exhaustion at administrative appeals stage). Although Section 243.3 was first adopted in 1992, the Department has taken the position (in *Atlantic Richfield Co.* v. *Babbitt*, No. 93-5040 (10th Cir.) (argued Nov. 16, 1994)) that its regulations and the structure of the administrative process required exhaustion before then, including at the time of the orders in this case. See 43 C.F.R 4.21(c) (1991); 30 C.F.R. 243.2 (1991) (authorizing suspension of MMS orders to pay additional royalties pending appeal to Director of MMS); *Marathon Oil Co.*, 90 IBLA 236 (1986) (discussing standards for suspension in such cases); *Darby* v. *Cisneros*, 113 S. Ct. 2539 (1993) (con-

Petitioners argue (Pet. 6) that in order to collect an amount that the MMS has ordered the lessee to pay, "the MMS must seek enforcement of its order from a federal district court." The practical reality, however, is different.

In the Department's experience, once an order to pay has been issued, the lessee either pays the amount due or pursues the available administrative procedures to challenge that order, perhaps followed by judicial review of a final administrative decision affirming the MMS's position.[9] Where a court upholds the Department's final decision, the lessee routinely pays the royalties due. Congress has provided a variety of remedies for nonpayment. See 30 U.S.C. 1719(c)(1) (penalty for "knowingly or willfully fail[ing] to make any royalty payment by the date as specified by * * * order"); 30 U.S.C. 1719-1720 (other civil and criminal penalties under FOGRMA); 30 U.S.C. 1722(a) (civil action to "restrain any violation" or to "compel the taking of

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struing 5 U.S.C. 704 with respect to finality and exhaustion). In these cases, some of the MMS orders issued to Phillips were affirmed by the Assistant Secretary of the Interior for Land and Minerals Management, thus obviating, as a practical matter, any question of finality as to them. Similarly, because ARCO amended its complaint to include a challenge to the final IBLA decision concerning NGLP valuation, the government did not raise a finality objection to judicial review of the other NGLP orders, which involved substantially identical legal issues. See Pet. App. 36a n.6; compare Pet. 6 (asserting, in passing, a much broader finality argument).

[9] Some lessees have paid the amount due under an administrative order and then sought recovery in the United States Court of Federal Claims. *E.g.*, *Black Butte Coal Co.* v. *United States*, 27 Fed. Cl. 699, vacated after settlement, 14 F.3d 612 (Fed. Cir. 1993).

any action required"); 43 U.S.C. 1350 (civil and criminal penalties under OCSLA); 43 U.S.C. 1334(d) (cancellation of leases under OCSLA for non-compliance with the Act, regulations, or lease). Direct judicial enforcement of a royalty payment order is only one such remedy. Indeed, the Department of the Interior is not aware of any action first brought by the government for judicial enforcement of a royalty payment order.[10]

The various statutory provisions just cited (together with the implementing regulations) represent, in structure and practice, a comprehensive royalty assessment and collection system. Within that system, Congress has provided certain legal or practical time limitations. See 30 U.S.C. 1755 (non-fraud civil penalty actions must be brought within six years); 30 U.S.C. 1713(b) (records on which audits are based must be maintained for a minimum of six years, unless the Secretary notifies the lessee that he has initiated an audit or investigation and that the records must be retained for a longer period). It is unlikely that when Congress enacted those provisions, and directed the Secretary to "audit and reconcile * * * *all* current and past lease accounts * * * and [to] take appropriate actions to make additional collections or refunds as warranted" (30 U.S.C. 1711(c)(1) (emphasis added)), it intended to incorporate *sub silentio* an additional limitations

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[10] The government need not counterclaim for enforcement as part of its response to a lessee's judicial challenge to the validity of a royalty payment order. See *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288, 1291-1292 (10th Cir. 1994). The counterclaim filed in this case was essentially protective. See page 6, *supra*.

provision designed for general actions to redress breaches of contracts with the government. To the contrary, the requirement in 30 U.S.C. 1713(b) that a producer maintain its records indefinitely, so long as the Secretary has notified it, within an initial six-year retention period, that he has "initiated an audit or investigation," strongly implies that Congress did not envision the application of a six-year statute of limitations drawn from outside FOGRMA's comprehensive statutory scheme. For these reasons, administrative and judicial proceedings involving the oil and gas royalty management provisions represent the sort of actions for which Congress has "otherwise," and more specifically, provided, and to which 28 U.S.C. 2415(a) simply has no application.

b. In any event, the other terms of Section 2415(a) make clear that it does not apply to bar enforcement of the royalty payment orders at issue in this case. The counterclaim in this case sought enforcement of administrative orders that petitioners had put at issue before the court through *their* complaint seeking a declaration that those orders were invalid. As the court of appeals held, neither the orders themselves nor the counterclaim for enforcement may properly be considered a "complaint" initiating an "action for money damages" within the meaning of Section 2415(a). Pet. App. 3a-4a & n.1; see also *id.* at 19a.

As described above, the normal practice under the Acts in question here is for producers to comply with the Interior Department's royalty payment orders, certainly once their validity has been upheld on judicial review. It should make no difference that in this case the Department asked the reviewing court to enter its own order confirming petitioners'

responsibility to pay. That request is not, in any traditional sense, an "action for money damages."

The situation is analogous, instead, to that in *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988), in which this Court held that an action to compel the federal government to pay to a State money claimed to be owed under the statutory terms of the Medicaid program was not an action seeking "money damages" within the meaning of the second sentence of 5 U.S.C. 702. The enforcement claim (and the underlying order) in this case, like the statutory reimbursement claim in *Bowen*, invoked the equitable powers of the district court to require petitioners "to belatedly pay expenses that [they] should have paid all along" under the applicable statutory and regulatory scheme. *Bowen*, 487 U.S. at 893-894 (quoting *School Committee* v. *Department of Education*, 471 U.S. 359, 370-371 (1985)). Under OCSLA and FOGRMA, the Secretary is entitled to determine the value of production that is subject to royalties and to implement that determination through payment orders. Equitable enforcement of such an order is not an order to pay "money damages." See also *Bowen*, 487 U.S. at 893-901.[11]

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[11] The *Bowen* Court pointed out (487 U.S. at 893) that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" Instead, the Court distinguished (*ibid.*) "an action at law for damages" from "an equitable action for specific relief." The Court quoted extensively (*id.* at 895) from Judge Bork's opinion in *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), in which he noted that the State was "seeking funds to which a statute allegedly entitle[d] it, rather than money in compensation for the losses * * *

c. Nor may the government's request for enforcement of its royalty payment order properly be characterized, under Section 2415(a), as an "action * * * founded upon [a] contract." Any request for enforcement of an order is, of course, founded upon the order to be enforced. And in this case that order is properly "founded" upon the statutory and regulatory requirements that lessees pay royalties on the full value of their production from federal leases, and upon MMS's corresponding audit and collection responsibilities.

To be sure, in designing its system for administering the private exploitation of the public's offshore natural gas resources, Congress built around a lease arrangement similar to that traditionally used for production arrangements among private parties. The mere fact that such a lease is itself a "contract" does not, however, transform an MMS order to pay, issued under an administrative scheme designed to implement the Secretary's independent responsibility to determine production values and collect appropriate royalties, into a mere contract claim. Nor can it transform a request to enforce such an order into an "action" that is "founded upon" a contract. Cf. *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 609 (D.C. Cir. 1992) (claims based on statutory obligations are not

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[that it had] suffered by virtue of the withholding of those funds." Similarly, in this case the government, in its counterclaim, merely asked the district court to give effect to the court's own judgment concerning the validity of the MMS orders (see Pet. App. 18a-19a & n.2)—or, at most, to "compel the taking of [an] action required by or under" FOGRMA, in accordance with the *equitable* enforcement provisions of 30 U.S.C. 1722(a).

contractual for purposes of 5 U.S.C. 702, even if those obligations are incorporated in a contract); *Katz* v. *Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) (similar).

All of the numerous cases involving disputes between the MMS and producers over royalty obligations have turned on questions of statutory and regulatory construction, not on the meaning of contract terms. See, *e.g.*, *Amoco Production Co.* v. *Lujan*, 877 F.2d 1243 (5th Cir.), cert. denied, 493 U.S. 1002 (1989); *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159 (5th Cir. 1988); *Mesa Operating Ltd. Partnership* v. *United States Dep't of the Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992); *Hoover & Bracken Energies, Inc.* v. *United States Dep't of Interior*, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984). In this case, too, petitioners' challenges to the MMS orders on their merits involved the interpretation of applicable statutory and regulatory provisions, not the construction of any of the terms of petitioners' various lease instruments. When the Department's position is sustained and an order's validity upheld in such litigation, a request for enforcement of the order engages neither the language nor the policies of Section 2415(a).

2. Petitioners contend further (Pet. 14) that the decision below is "in tension" with that in *3M Co.* v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994). They base that contention on the court of appeals' rejection of petitioners' novel theory (Pet. 14-15, 25-26) that Section 2415(a) applies not only to judicial filings seeking enforcement of administrative royalty payment orders (such as the government's counterclaim in this case), but to the agency's issuance of those orders themselves.

3M applied a very different general limitations provision, 28 U.S.C. 2462, which imposes a five-year limit on any "action, suit or proceeding" to enforce a civil penalty. The court in *3M* focused on Section 2462's use of the term "proceeding," the fact that the Administrative Procedure Act and other statutes "call[] agency adjudications 'proceedings,'" see 5 U.S.C. 554(b), and the use of the same term in the defendant Environmental Protection Agency's regulations to describe the agency's process for assessing civil penalties. 17 F.3d at 1456. Under those circumstances, the court held that Section 2462 governed the EPA's initiation of administrative civil penalty "proceedings" as well as the commencement of a judicial action.

Section 2415(a), by contrast, does not use the term "proceeding." The court of appeals correctly recognized (Pet. App. 3a) that the statutory terms "complaint" and "action for money damages" refer to "a suit in court." Petitioners' contrary theory would transform the statutory phrase "unless the complaint is filed" into "unless the preliminary agency action, subject to internal appeal and later judicial review, is taken." That construction is implausible, and would conflict with language elsewhere in the same statute (which clearly refers to judicial actions) as well as with decisions of other courts. See 28 U.S.C. 2415(e) (referring to actions "timely brought" and then "dismissed without prejudice," and to the "defendant" in a subsequent action); see also, *e.g.*, *S.E.R., Jobs For Progress, Inc.* v. *United States*, 759 F.2d 1, 4-5 (Fed. Cir. 1985) (contract officer's decision and subsequent administrative proceedings not subject to Section 2415(a)); *Doko Farms* v. *United States*, 956 F.2d 1136, 1139-1141 (Fed. Cir. 1992) (statute barring suit to

collect amount due "does not bar the government from invoking its administrative remedies"); *Thomas* v. *Bennett*, 856 F.2d 1165, 1169 (8th Cir. 1988) (running of statute of limitations barred suit on student loan, but not set-off of amount due against later tax refund).

3. Finally, petitioners contend (Pet. 11-12) that the decision below conflicts with those of the Tenth Circuit in *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858 (1993), and *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288 (1994).[12] In fact, however, the Tenth Circuit has never addressed the question presented by the petition and cross-petition.

In *Phillips*, the government did not dispute the general applicability of Section 2415(a) in the district court, and that question was neither briefed nor argued to the court of appeals. Both the parties and the court focused instead on questions of accrual and tolling, as affected by the special nature of the federal leasing and audit program. Under the circumstances, the court's notation (4 F.3d at 860 n.1), in passing and without analysis, that it "agree[d] with the parties that 28 U.S.C. § 2415(a) is the controlling statute of

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[12] Petitioners also argue (Pet. 12-14) that the decision below conflicts with a variety of decisions applying Section 2415(a). Most of those decisions are simply inapposite, because they involved claims that were concededly contractual, in circumstances far removed from the specialized statutory and administrative regime involved here. See Pet. 13-14, and cases there cited. Indeed, in light of the cases petitioners cite, their observation that "the application of Section 2415(a) depends on the substance of a claim rather than its form" (Pet. 14) supports the government's position more clearly than it does their own.

limitations," cannot be accepted as an authoritative holding. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2257 (1994); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) (Posner, J.).

Similarly, in *Mesa* the Tenth Circuit assumed, but did not decide, the applicability of Section 2415(a). See 17 F.3d at 1289, 1291. Mesa had already lost a substantive challenge to a royalty payment order in the Fifth Circuit. See *id.* at 1290. In the Fifth Circuit litigation, Mesa had never claimed limitations as a bar to enforcing the order, and it had posted a bond promising to pay if it lost the case. See *id.* at 1290-1291. After the government reiterated its demand for payment, Mesa sued in a district court in the Tenth Circuit to bar collection, relying on Section 2415(a). The parties briefed the applicability of that Section before the court of appeals (see, *e.g.*, 92-5241 Gov't C.A. Br. 20-26), but the court did not reach the issue. Instead, the court concluded that, under the circumstances, Mesa's conduct of the prior litigation precluded any application of the statute of limitations.

Thus, contrary to petitioners' contention, the issue of whether Section 2415(a) applies to requests for judicial enforcement of natural gas royalty payment orders of the sort at issue here remains open in the Tenth Circuit. We are informed that there are at least a dozen cases presently pending in district courts in that circuit, the Ninth Circuit, and the District of Columbia Circuit in which the appli-

cability of Section 2415(a) is squarely presented.[13] If and when those cases reach the appellate level, each of the relevant courts of appeals will have the opportunity to consider the matter *de novo*, with the benefit of full briefing and argument. If any of those courts disagrees with the decision in this case and holds that Section 2415(a) does apply in like circumstances, a concrete circuit conflict on that issue will then be presented. The Court may then consider whether the issue is of sufficient practical importance to warrant review.[14] Until that time, however, review by this Court would be premature.

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[13] In two cases the issue has been fully briefed and argued and the parties are awaiting decisions. *Marathon Oil Co.* v. *Babbitt*, No. 94-N-1429 (D. Colo.); *Samedan Oil Corp.* v. *Deer*, No. 94-CV-02123 (RCL) (D.D.C.). Briefing is scheduled to begin in April in a third case, *Atlantic Richfield Co.* v. *Department of Interior*, No. 94-62-BLG-JDS (D. Mont.).

[14] As petitioners acknowledge (Pet. 18 n.8), even if Sec-tion 2415(a) applies to the issuance or enforcement of royalty payment orders, further questions (not presented by petitioners in this case) necessarily arise concerning when the government's cause of action accrues under that Section, and the application of the tolling provision in 28 U.S.C. 2416(c) in the particular context of MMS audits under FOGRMA. Section 2416(c) excludes, for purposes of computing the six-year limitations period under Section 2415(a), "all periods during which * * * facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." In the *Phillips* case on which petitioners rely in asserting a conflict here, the Tenth Circuit recognized that the government will usually need to conduct an audit to discover that additional royalties are owed, and that FOGRMA's auditing and record-retention provisions would have to be taken into account in determining when the government "reasonably" should have known of an underpayment of

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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royalties. See 4 F.3d at 863-864. Petitioners therefore err in suggesting that the application of Section 2415(a) would necessarily result in a rigid six-year limitations period. Because the Tenth Circuit has not yet *either* passed upon the argument that Section 2415(a) does not apply at all in this setting *or* elaborated further, since *Phillips*, on how tolling principles should be applied in this setting, it is not clear at this point how much, if any, practical difference there might ultimately be in the results reached by the court below and the Tenth Circuit (or the other courts of appeals that have not yet addressed either of those issues).